

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STONEMOR, INC.,
PETITIONER

Vs.

CIVIL NO.
22-cv-1388 (GC)

THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 469,
RESPONDENT

JANUARY 25, 2023
CLARKSON S. FISHER COURTHOUSE
402 EAST STATE STREET
TRENTON, NEW JERSEY 08608

B E F O R E: THE HONORABLE GEORGETTE CASTNER
U.S. DISTRICT COURT JUDGE
DISTRICT OF NEW JERSEY

A P P E A R A N C E S:

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**HEARING ON PETITIONER'S MOTION TO VACATE ARBITRATION
AWARD/RESPONDENT'S MOTION TO CONFIRM ARBITRATION AWARD**

FRANCIS J. GABLE, C.C.R., C.R.R.
OFFICIAL U.S. REPORTER
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1 THE COURT: Good afternoon. We are on the record in
2 the matter of StoneMor, Inc. versus International Brotherhood
3 of Teamsters, Local 469, Docket Number 22-cv-1388. May I have
4 appearance of counsel please.

00:05 5 MS. LETOURNEAU: Good afternoon, your Honor, Patrice
6 Letourneau, James Redeker and Elizabeth Mincer of Duane Morris
7 on behalf of StoneMor.

8 THE COURT: Good afternoon.

00:05 9 MR. KENNEDY: Good afternoon, your Honor, Seth
10 Kennedy from the firm of Kroll, Heineman, Ptasiewicz and
11 Parsons on behalf of Teamsters Local 469.

12 THE COURT: Good afternoon.

00:05 13 We are here for argument on petitioner's motion to
14 vacate an arbitration award, and respondent's cross motion and
15 opposition. So I scheduled the oral argument because I had
16 some questions for the parties. I've read the papers, I'm
17 familiar with the issues, I just wanted to kind of narrow in
18 on some questions I had. So let's start with that.

00:06 19 One of the issues I see -- please be seated. One of
20 the issues that I wanted to raise and hear from the parties
21 about was when did a valid agreement arise? Meaning, on
22 October 5th, 2020 the tentative agreement was ratified. At
23 that time does it become an enforceable agreement?

00:06 24 MS. LETOURNEAU: Your Honor, if I may and I'm going
25 to quote from the union's brief --

1 THE COURT: And I'm asking the question specifically
2 because four days later we have a dispute on a pretty
3 significant term of the agreement; right?

4 MS. LETOURNEAU: Um-hmm.

5 THE COURT: So, was there a meeting of the minds at
6 that time or not and therefore the agreement's not valid? I'd
7 like to hear from you about that.

8 MS. LETOURNEAU: So to quote from the union's brief
9 which is on page 2, they state that: The parties reached an
10 agreement which will become final upon ratification by the
11 union members and the union's ratification vote took place on
12 October 5th, 2020.

13 We also have case law in the Third Circuit that we
14 cite in our brief, *Mack Trucks*, and this Circuit has held that
15 in despite of unresolved disputes a collective bargaining
16 agreement is still in effect and the contractually mandated
17 grievance procedures must be followed even as the parties --
18 as again the union's brief state -- were reformatting the CBA.

19 So, despite their being unresolved disputes as to
20 the interpretation of this waive provision, the agreement was
21 in effect and I don't think -- believe that there's a dispute
22 that the agreement was in effect as of October 5th, 2020 and
23 that the contractually mandated grievance procedures which
24 again that is how the union has described the grievance
25 procedure in their brief was in effect and must be followed.

00:08

1 MR. KENNEDY: And your Honor, if I may, I don't
2 think there's any dispute that the agreement was final and
3 binding as of October 5th. Within days after that however,
4 the language that was being proposed by the employer wasn't a
5 reformatting of the agreement and it wasn't a dispute as to
6 the interpretation of the agreement. It was a proposed
7 rewriting of the language of the agreement.

00:09

8 I think one of the most salient issues here as
9 Arbitrator Charles noted in her award is that the first time
10 that the employer acknowledged that the agreement -- that the
11 language which had been agreed to on October 5th was going to
12 be a term of the contract, was December. From October through
13 December there were ongoing active discussions, not of
14 interpretation and not of formatting, but of the very language
15 of the contract itself.

00:09

16 THE COURT: Right. But that's where I have an
17 issue. How can you say you have a valid agreement October
18 5th, and then say we're still working on the agreement, it's
19 not valid until December? You can't have it both ways. You
20 can't say I have a valid agreement today we ratified it, but
21 then the agreement's finalized December 29th, 2020.

00:09

00:10

22 MR. KENNEDY: And that dispute arose as a result of
23 the new proposals being thrown in and the ongoing discussions,
24 and this -- this -- it didn't just lay dormant, the parties
25 went through mediation and were in ongoing discussions of what

1 that final language would be. And there's no way to arbitrate
2 the interpretation of language that hasn't been finalized.

3 THE COURT: But you agree that on October 5th, 2020,
4 the agreement was ratified and it becomes a binding agreement
5 at that point in time; correct?

6 MR. KENNEDY: Yes, your Honor.

7 THE COURT: Okay. Mr. Kennedy, I read the -- and I
8 apologize if I'm mispronouncing this case, the *Monogahela*
9 *Valley Hospital* case; tell me how you distinguish that case
10 from it applying here?

11 MR. KENNEDY: Give me one moment to pull up --

12 THE COURT: Sure.

13 (Brief pause.)

14 MR. KENNEDY: Forgive me, your Honor.

15 THE COURT: That's okay. I want to go back and
16 drill down on this. Because to me it's seeming like the union
17 wants it both ways. They want to have to benefit of the
18 agreement on October 5th, but they don't want to comply with
19 the actual terms of the agreement on October 5th.

20 MR. KENNEDY: Well, your Honor, the union did want
21 to comply with the terms of the actual agreement on October
22 5th, but again the dispute -- in the union's the agreement was
23 clear and final and binding on October 5th. But particularly
24 in the context of a first collective bargaining agreement,
25 where the terms are being set out for the first time, there

1 was no prior agreement history before this agreement. And the
2 establishment of the language for this contract set the tone
3 for the bargaining relationship moving forward, so the actual
4 terms of the final collective bargaining agreement become a
5 significant point.

6 So, the union wasn't just waiting to file a
7 grievance for the sake of waiting to file a grievance, the
8 union was attempting to amicably resolve the terms of the
9 agreement as it was trying together. When a dispute came up,
10 the parties discussed and while there was discussion of the
11 grievance and arbitration procedure earlier in that
12 correspondence you can see in the correspondence as it goes
13 there's continuing attempts by the employer to change not just
14 the interpretation of the language, but the language itself.

15 And again, that language is ultimately what needs to
16 be interpreted by an arbitrator. And before there was final
17 agreement on what that language was, that would have been
18 asking the arbitrator not to interpret the language of a
19 contract, but to look at two competing language proposals, and
20 decide which one should have been the contract.

21 In the public sector labor relations we call that
22 interest arbitration where you go to arbitration and two sides
23 give an arbitrator two different contract proposals, and the
24 arbitrator chooses which one is going to go in the contract;
25 this was grievance arbitration. And that required the

1 language to be finalized for an arbitrator to interpret. If
2 the employer's response in early October had been we'll put
3 the language into the contract and if we have the arbitrate it
4 we'll arbitrate it, that would have been one thing, that
5 wasn't how the employer responded.

6 The employer responded by repeatedly proposing new
7 language that should have been included in the contract. And
8 because that language wasn't final, the union couldn't go to
9 grievance arbitration until that language was signed.

10 MS. LETOURNEAU: Your Honor --

11 THE COURT: Ms. Letourneau?

12 MS. LETOURNEAU: This Circuit has stated that
13 despite a CBA not being finalized in terms of reformatting --
14 and again I'm using the terms that the union used in their
15 brief, we were reformatting a CBA; that you can have terms out
16 there that needed interpretation or need discussion and that
17 doesn't make the agreement not effective.

18 And what we're -- haven't said or what I haven't
19 heard is that the contractual grievance procedure was any way
20 at issue or wasn't final. Every single provision of this
21 agreement according to them on October 5th was final, and they
22 could have gone to arbitration at that point. In fact, you
23 know, we had e-mails at Exhibit E where what is at issue and
24 what was at issue in the arbitration is exactly what's being
25 discussed and at the end the employer says to the union you

1 can file a grievance if you like to and they failed to do so.

2 So I don't see -- again as your Honor said before,
3 how they want to have their cake and eat it too. They want
4 this provision and this issue to be somehow ripe and binding
5 as of October 5th, and yet at the same time they're not
6 required to follow the grievance procedures that they
7 themselves characterized as contractually mandated.

8 THE COURT: And what do you think about the fact
9 that the parties' conduct -- like isn't just submitting a
10 grievance in writing, isn't that just a formality? I mean the
11 parties were actually negotiating, attending mediations, so
12 essentially the conduct is sufficient to show that they were
13 proceeding under the grievance procedures?

14 MS. LETOURNEAU: The employer didn't feel that that
15 conduct was sufficient, and there's you know contractually
16 mandated language for a reason. They agreed that this is how
17 they were going to proceed. And if we're going to disregard
18 that then why can't we disregard any provision in the
19 contract. They were repeatedly told we don't believe that you
20 have filed a grievance and it was raised over and over again
21 that you haven't followed what you agreed to do.

22 So I mean I don't think that it's a matter of --
23 it's reading an exception into that paragraph that isn't
24 there, there was no exception. It said time is of the
25 essence, this is how we need to file a grievance if we're

1 going to file one, and you have to do it within 10 days and
2 that's something that they agreed to.

3 THE COURT: And what would that look like, sending
4 you a letter, a written submission?

00:17 5 MS. LETOURNEAU: Their grievance is at exhibit --
6 one moment; at Exhibit C you'll see their grievance report,
7 and note that they have to note what the date is the date
8 occurred. So we have two different occurrences here. First
9 we have shortly after the agreement is entered into when
00:18 10 there's a dispute as to the interpretation of that provision;
11 and then second we have another occurrence where when the
12 employer goes to pay the employees and doesn't include that --
13 that wage increase that was at issue. So we have two separate
14 occurrences in October.

00:18 15 Had they filed a grievance report those would have
16 been listed in there. Here we have a grievance report that
17 says date of incident is December 30th, 2020 and continuing.
18 There -- you know, it's making a record and it's setting forth
19 what it is that's at issue and how jurisdictionally the
00:18 20 arbitrator is supposed to decide those issues. We don't have
21 that here.

22 THE COURT: Mr. Kennedy?

23 MR. KENNEDY: Well, your Honor, I think on the
24 subject of when violations occur, the -- and I recall this --
00:19 25 I discussed this in our post arbitration brief which is

1 connected to our cross petition; for wage disputes, if a wage
2 is being wrongly paid or alleged to be wrongly paid, the
3 violation is reoccurring with each new paycheck. So, even if
4 the union had not filed a grievance --

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5 THE COURT: I'm sorry, Mr. Kennedy; that's someone's
6 telephone?

7 MS. MINCER: If I may, your Honor, it may be a
8 medical device.

9 THE COURT: Okay. Go ahead, Mr. Kennedy.

00:19

10 MR. KENNEDY: So with each new paycheck where a
11 wrong wage is being paid, that is a new contract violation.
12 So even in the event that the union's correspondence and
13 conduct with the employer from October to December couldn't
14 act as a stand-in for the grievance procedure, there are still
15 ongoing violations.

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16 And if the arbitrator -- or it would be the union's
17 argument as made to the arbitrator is correct, every new
18 paycheck being paid to date that has not been corrected for a
19 wage increase missed two years ago is still incorrect. Which
20 means that the -- there is still a valid harm to be addressed
21 and still a viable claim to be made.

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22 That being said, also yes, the employer was on
23 notice of the dispute, the employer was on notice of the
24 union's intent to pursue that dispute throughout those
25 discussions. And while the formalisms of the grievance

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1 procedure may not have been strictly adhered to during that
2 timeframe, again the union would submit that declining to
3 engage in that process was because the language was not
4 final --

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5 THE COURT: But wouldn't the date of occurrence,
6 wouldn't it have been sooner, as opposed to the December 29th,
7 2020? Is that the date of --

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8 MS. LETOURNEAU: That's the date that they put down
9 in their grievance report. Now, that's not what the
10 arbitrator applied in terms of the reasoning and nor is it
11 supported by the CBA. Yes, under here the grievance arises
12 when there's -- should any grievance arise as to the
13 interpretation of or alleged violation of the agreement, the
14 union shall process the grievance in accordance with the
15 following procedures; if union shall reduce it to writing and
16 take that to the superintendent or his designees within 10
17 days of this occurrence in an attempt to effect a satisfactory
18 settlement.

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19 That's what the grievance procedure -- the
20 contractually mandated grievance procedures that they agreed
21 to state. It's not a continuing violation nor is that the
22 reasoning that the arbitrator applied, nor is it supported by
23 the CBA. That once they knew that there was a disagreement as
24 to the interpretation of the agreement and believed that there
25 was an alleged violation, they had 10 days to file grievance

00:22

1 report to trigger the contractually mandated grievance
2 procedures.

3 They didn't do that, they waited 50 days, all the
4 way to December to doing anything, and then put down an
5 alleged occurrence date that doesn't even match when the
6 dispute arose.

7 THE COURT: When the actual occurrence would have
8 started, which would have been on the first paychecks where
9 you realized that we don't have the increase that we thought
10 we were entitled to; right?

11 MR. KENNEDY: Correct, that would have been the
12 first of many occurrences.

13 THE COURT: So, based on your grievance you would
14 say we don't have a grievance, those paychecks were right?

15 MR. KENNEDY: No, your Honor, I think the date of
16 occurrence on the grievance was likely lifted simply as a form
17 of being filled out. The union would not be waiving its claim
18 as to the inaccuracy of the earlier paychecks, though to the
19 extent that the arbitrator would have applied a December 30th
20 occurrence date as opposed to an earlier one, again, that
21 would have been a procedural matter as to where to cut off the
22 remedy and wouldn't speak to the merits of the grievance
23 itself or the reasoning of the award.

24 MS. LETOURNEAU: Your Honor --

25 THE COURT: Counsel?

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1 MS. LETOURNEAU: The agreement says -- again the
2 contractually mandated grievance procedures state that if they
3 fail to follow the procedures, then it's settled on the basis
4 of the last answer of the employer. So if it's not -- like
5 the last answer of the employer is what's binding. So, when
6 they didn't back in October raise the grievance file it
7 appropriately and take that procedural step, our response that
8 this was how we were interpreting the CBA and that this is how
9 we were paying the employees as of I believe it was October
10 29th, was binding and settled per the agreement that they
11 agreed to.

12 THE COURT: And how do you -- let me hear your
13 position with respect to the great deference that we give to
14 arbitrator's decisions.

15 MS. LETOURNEAU: There is great deference to the
16 interpretation of a contract by the arbitrator.

17 THE COURT: Including clear errors of law.

18 MS. LETOURNEAU: Well, this isn't an error of law,
19 this is a complete disregard of the terms of the agreement.
20 She was reading into the agreement a provision that doesn't
21 exist there, there are no exceptions. It was time is of the
22 essence, it was 10 days. It's not 10 days while the parties
23 are trying to work out their -- their, you know -- their
24 dispute as to the interpretation of the agreement. It's a
25 flat 10 days. That is -- there's nothing in there that would

1 grant her authority to read that into the contract.

2 And so it is not of great deference, it is not an
3 interpretation of law, it's not an interpretation of contract,
4 it's wholly made up.

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5 THE COURT: Mr. Kennedy?

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6 MR. KENNEDY: I would wholly disagree with that
7 characterization. And at a base principle the purpose of the
8 broad deference that arbitration awards receive in our courts,
9 is an acknowledgment of the fact that arbitration of contract
10 disputes is part and parcel of the system that provides for
11 amicable labor relations, and for resolution of those disputes
12 in an amicable and contained way.

00:25

13 And the -- what happened here was there was a
14 contractually mandated grievance procedure, this was a first
15 contract and the parties were working towards figuring out the
16 language of that first contract. The arbitrator didn't read
17 any new contract terms in, the arbitrator plain on the face of
18 her award was perfectly aware of the contract requirements and
19 read them, but on her view of the situation and in light of
20 the evidence presented at the arbitration hearing, her
21 application of that grievance procedure and the legal canons
22 around procedural arbitrability was that under these
23 circumstances the union's nonadherence to the strictures of
24 the grievance procedure before December 30th did not
25 invalidate the grievance.

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1 That was her conclusion applying valid legal
2 interpretation to the terms of the agreement, the evidence,
3 the conduct of the parties, the testimony that she received at
4 the arbitration hearing and that is entitled to deference,
5 your Honor.

00:26

6 THE COURT: Go ahead, counsel.

7 MS. LETOURNEAU: There is no dispute about the --
8 the grievance procedure. You're talking about what is you
9 know an issue of interpretation, well there was no dispute as
10 to this is the grievance procedure, there was no dispute as to
11 the interpretation of that grievance procedure, and there was
12 nothing in there that would allow the arbitrator to say that
13 they could toll that, nor did the parties in any way toll that
14 grievance process.

00:27

15 And this is precisely why Section 10 of the FAA is
16 there, it's for these situations where an arbitrator cedes
17 their authority by reading into a parties' agreement
18 contractual language that doesn't exist.

00:27

19 THE COURT: Mr. Kennedy, what's the authority for
20 the arbitrator to say that the parties' conduct is enough to
21 toll the provisions under the agreement? What case law are
22 you relying on to support that the arbitrator -- that there's
23 authority for that, other than just the conduct of the
24 parties?

00:27

25 MR. KENNEDY: Well, the arbitrator does not cite any

1 case law in that provision of her award admittedly, but
2 particularly in situations where -- where a continuing
3 violation is -- is the issue being alleged, arbitrators
4 generally do grant the parties some leeway in strict adherence
5 to grievance procedures.

6 And again, this was a situation where because they
7 -- because the language itself was still what was at issue,
8 her understanding of applying those principles was that under
9 those circumstances the union's waiting to file a formal
10 grievance until the employer and for the first time
11 acknowledged the definitively agreed-to language was the
12 agreement, multiple times throughout the correspondence the
13 employer refers to their modified language as what was
14 actually agreed to, even though it differs markedly from what
15 was in the tentative agreement. Under those circumstances the
16 arbitrator applied some leeway to allow for the process that
17 was seeking to finalize that language.

18 THE COURT: And what case law are you relying on
19 that allows the arbitrator to do that?

20 MR. KENNEDY: Your Honor, I was not able to identify
21 any cases that were specifically on point, though the cases
22 that are cited by the employer in their filings are materially
23 distinguishable in where they fall in the grievance process
24 and the reasoning of the arbitrator's decision. This
25 arbitrator's decision is perfectly consistent with a large

1 body of case law within the context of labor arbitration that
2 allows for -- for some flexibility in the procedural timelines
3 where continuing violations are...

4 THE COURT: Anything --

00:29 5 MS. LETOURNEAU: The union wasn't able to find case
6 law because there isn't case law on point. In fact you know,
7 the Fifth Circuit in a decision, *Southwest Airlines* on almost
8 identical facts, found for the employer and vacated an
9 arbitration award that had been -- excuse me; vacated an
00:30 10 arbitration award that the union had tried to argue was timely
11 per the grievance procedures. And this case is identical to
12 that, that there were no exceptions under the grievance
13 procedures. The arbitrator did not have authority to read in
14 exceptions in the contract that didn't exist.

00:30 15 And that's consistent with both Third Circuit case
16 law and still -- and following *Steelworkers* and *Mack Trucks*
17 and the Fifth Circuit in *Southwest Airlines*.

18 MR. KENNEDY: And your Honor, one of the most --
19 *Southwest Airlines* is not specifically on point. And one of
00:30 20 the most important pieces of that is in *Southwest Airlines* the
21 arbitrator specifically held that the signature date of the
22 CBA was the effective date of the CBA. That is not what
23 Arbitrator Charles determined. Arbitrator Charles was looking
24 at one specific contract provision, and saying that because
00:31 25 the parties had not finalized that language, the union was

1 entitled to ensure that the language it had agreed to was the
2 language of the contract before advancing to the grievance
3 procedure.

4 If Arbitrator Charles had said the CBA wasn't --
5 wasn't signed until December 30th so December 30th is the
6 effective date of the CBA, we wouldn't be here right now
7 because she would have been wrong. She wasn't wrong, her --
8 her reasoning was significantly different from the reasoning
9 in the underlying arbitration award in *Southwest Airlines*, and
10 that makes this case significantly different from *Southwest*
11 *Airlines*.

12 THE COURT: Right. Instead she said that the
13 agreement was valid October 5th, 2020; right?

14 MR. KENNEDY: That's correct, your Honor, and
15 then --

16 THE COURT: It doesn't seem to appear that the
17 parties dispute that.

18 MR. KENNEDY: The parties don't dispute that, your
19 Honor, and neither did the arbitrator but the arbitrator's
20 legal reasoning from that point is not inconsistent with that.

21 THE COURT: I don't have any further questions. Ms.
22 Letourneau, do you have anything further you'd like to add?

23 MS. LETOURNEAU: No, I appreciate your Honor's time.
24 We feel that -- as you said, the agreement was effective
25 October 5th and as of October 5th the contractually mandated

1 grievance procedures were to be followed. And there was no
2 exception under those contractually mandated grievance
3 procedures to allow for a tolling just because the parties
4 were continuing to discuss the interpretation of one of the
5 wage provisions that they likewise would like to have
6 enforced. And they want to have their cake and eat it too and
7 it doesn't work that way.

8 THE COURT: Okay. Well, I appreciate the parties
9 appearing today for argument. I just wanted to go over some
10 of those questions that I had. It was very helpful, so I
11 appreciate it. I will reserve decision but will have an
12 opinion coming shortly.

13 MS. LETOURNEAU: Thank you, your Honor.

14 MR. KENNEDY: Thank you very much your Honor.

15 THE COURT: Thank you. This matter is adjourned.

16 (Matter concluded.)

17 - - -

18 "I certify that the foregoing is a correct transcript from the
19 record of proceedings in the above-entitled matter."

20
21 /S/ Francis J. Gable, C.C.R., C.R.R. April 24, 2023

22
23 _____
24 Signature of Court Reporter

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